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IN THE

Supreme Court of the United States

834

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. .....

THE COUNTY OF LOS ANGELES and the CITY OF BURBANK,
Petitioners.

vs.

THE FLYING TIGER LINE, INC., a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioners, the County of Los Angeles and the City of Burbank, respectfully pray for a Writ of Certiorari to the Supreme Court of the State of California in order to review the judgment thereof, affirming the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, and holding that the domiciliary and home port state of migrating aircraft which have made taxable physical contacts with other states may only tax such migrating property on the basis of the time spent in such domiciliary and home base state.

Opinions Below.

The trial court rendered a written memorandum opinion unreported in the California official reports or in the regional reports. The opinion of the trial court is set forth hereinafter as Appendix C.

The intermediate California Appellate Court, the California District Court of Appeal, Second District, Division Three, rendered a written opinion, unreported in the official California Reports but reported in 323 P. 2d pp. 1065 to 1071. The opinion of the California District Court of Appeal is set forth hereinafter in Appendix B.

The three separate opinions by Justices of the California Supreme Court are reported as follows: The opinion by Justice McComb for three of the four majority Justices is reported in 51 A. C. pp. 317-324, and 333 P. 2d pp. 323-328, and is set forth herein in Appendix A, pp. 1-11. The opinion by majority Justice Carter is reported in 51 A. C. pp. 324-328, and 333 P. 2d pp. 328-331, and is set forth herein in Appendix A, pp. 11-17. The opinion of the three dissenting Justices written by Justice Traynor (joined by Chief Justice Gibson and Justice Spence) is reported in 51 A. C. pp. 328-332, 333 P. 2d pp. 331-333 and is set forth herein in Appendix A, pp. 17-23.

The judgment of the Court below, the California Supreme Court, in conformance with that court's practice, is the final paragraph of Justice McComb's opinion (App. A, p. 11, 333 P. 2d 328) which reads "The judgment is affirmed."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The judgment sought to be reviewed was rendered and entered on December 16, 1958.

2. Timely filed petition for rehearing was denied on January 14, 1959, Chief Justice Gibson, Justice Traynor and Justice Spence dissenting from denial of said petition.

3. The statutory provisions invoked as conferring on this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U. S. C., Secs. 1257(3) and 2101.

Question Presented for Review.

When migratory aircraft become subject to an apportioned tax by a non-domiciliary, non-home-port state according to the principle propounded by this Court in *Braniff Airways v. Nebraska State Board*, 347 U. S. 590, what apportionment method for taxation of said aircraft is then permitted to the domiciliary or home-port state under the Commerce and Due Process Clauses, United States Constitution? May the domicile or home-port base its method of apportioned taxation of such aircraft upon the portion of the value of said aircraft not taxable elsewhere at all? Or, is the domicile or home-port, when aircraft become subject to apportioned taxation by a non-domiciliary state, thereupon restricted to physical contacts as the basis for its apportioned tax?

Statement of the Case.

Facts.

Flying Tiger Line, Inc., is a commercial air carrier, incorporated by the State of Delaware. Its principal place of business, the home port of its planes and its repair and overhaul terminal were during 1953 all located at Lockheed Air Terminal, in the City of Burbank, County of Los Angeles, State of California [R., Clk. Tr. 40, 55][1]. The Flying Tiger Line had no contacts with the State of Delaware other than that such state is the state of incorporation.

Ad valorem property taxation for 1953 of five Flying Tiger Line aircraft is in question in this litigation [R., Clk. Tr. 29, 40]. These five aircraft were during 1953 operated by Flying Tiger Line principally as a part of the Pacific Airlift in support of the Korean War and flew between Travis Air Force Base in Northern California and Tokyo, Japan, with intermediate stops at Honolulu and Wake Island [R., Clk. Tr. 30, 40]. The subject planes also made a few other flights in other foreign commerce and interstate commerce. When not in use the planes were located at their home port and the principal place of business of Flying Tiger Line in the City of Burbank, County of Los Angeles, State of California [R., Clk. Tr. 55].

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[1]All references to the record in this case submitted pursuant to Rule 21(1) will be to that portion thereof denominated Clerk's Transcript and will be to particular pages of said latter document

The planes were assessed by the Assessor of the County of Los Angeles as of the first Monday of March 1953, on the basis of 100% of their value, and a tax was levied on Flying Tiger Line on the basis of such assessment [R., Clk. Tr. 40, 55].

Flying Tiger Line, in July, 1953, properly pursued the administrative remedy provided by California law (Cal. Rev. and Tax. Code, Secs. 1601 to 1615, incl.) for correcting improper assessments by applying to the Board of Equalization of Los Angeles County for reduction of the assessed values of the five subject planes to a fraction thereof equal to the ratio of time spent in Los Angeles County during the assessment year to total time in such year. The local administrative board, the Board of Equalization of the County of Los Angeles, denied Flying Tiger's application for reduction of the assessed value of the five subject aircraft [R., Clk. Tr. 31, 32, 40]. Subsequently, the Flying Tiger Line paid the taxes levied against it on account of said non-apportioned assessment [R., Clk. Tr. 35, 40].

Flying Tiger Line then brought suit in the Superior Court of Los Angeles County for recovery from petitioners, the local taxing authorities, of all taxes which were levied on that portion of the value of the five aircraft not attributable to Los Angeles County because of time spent therein during the tax year [R., Clk. Tr. 28-36]. The Superior Court awarded judgment to Flying Tiger Line and held that the State of California, acting through petitioners, had the power under Federal law to tax only

that portion of the value of the subject aircraft equal to the ratio of time spent in Los Angeles County to total time in the year [R., Clk. Tr. 41]. The District Court of Appeal reversed the judgment of the Superior Court and held that the State of California (which exercises its ad valorem property taxing power through petitioners) since it was the home base of the aircraft and the commercial domicile of the owner thereof, could tax such aircraft on the basis of the full value thereof, less only that fraction of full value attributable to other states because of the physical contacts of the planes therewith (App. B herein). Later the Supreme Court of the State of California, by a 4-3 decision, reversed the District Court of Appeal, affirmed the trial court, and held, upon the basis of this Court's decisions in *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292; *Ott v. Mississippi Valley Barge Line*, 336 U. S. 169; *Standard Oil Co. v. Peck*, 322 U. S. 382, and *Braniff Airways, Inc. v. Nebraska State Board*, 347 U. S. 590, that the home port state and the state of commercial domicile of migrating property, which makes taxable physical contacts with more than one state can tax such property only upon the basis of time spent in the home port or domicile. There were three separate opinions rendered by the California Supreme Court no one of which mustered a majority of that court. Justice McComb, of the California Supreme Court, wrote an opinion, concurred in by Justices Shenk and Schauer of that court, affirming the judgment of the trial court (App. A, pp. 1-11). Justice Carter, of the same court, now deceased,

wrote an opinion concurring in the opinion that the trial court should be affirmed (App. A, pp. 11-17). Justice Traynor of the same court wrote a dissenting opinion, concurred in by Chief Justice Gibson and Justice Spence, holding that California, as the home base and commercial domicile of the subject aircraft could tax such property on the basis of the full value thereof less only that portion of the value attributable to other states because of regular, recurring contacts therewith (App. A, pp. 17-23).

Constitutional Provisions Involved.

United States Constitution, Article I, Section 8, Clause 3, and, Fourteenth Amendment, Section 1, Due Process Clause.

Reasons for Granting the Writ.

Preliminary Statement.

This case presents to this Court the opportunity to extend further the propositions of law and principles propounded in *Northwest Airlines v. Minnesota*, 322 U. S. 292; *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169; *Standard Oil Co. v. Peck*, 342 U. S. 382, and *Braniff Airways, v. Nebraska State Board*, 347 U. S. 590. This case presents to this Court for solution the problem of what method of apportionment the home base of migrating aircraft, and the commercial domicile of the owner thereof, may use when such aircraft have made taxable contacts with other jurisdictions. The majority of the Justices of the California Supreme Court (four Justices) were of the opinion (App. A, pp. 1-17) that when migrat

ing property makes taxable physical contacts away from its home base, and away from the commercial domicile of the owner thereof, that the power of the home base and commercial domicile to tax is thereby diminished and is thereafter dependent upon and exclusively to be measured by the physical contacts between the migrating property and the home base. In other words, the majority of the California Supreme Court recognize that there are two bases upon which is founded the power to tax migrating property: (1) home port or domicile, and (2) physical contacts. The majority of the California Supreme Court recognizes that when migrating property does not make taxable physical contacts with any state other than its home port, or the commercial domicile of the owner, that the home base or commercial domicile can tax such property on an unapportioned basis—on the basis of 100% of its value. The majority of the California Supreme Court is of the opinion, however, that when migrating property makes taxable physical contacts with some state other than the home base or commercial domicile, no matter how slight, then the home base or domicile must depend exclusively on its physical contacts with such property as the sole basis for its power to tax; that in such situation, when migrating property makes taxable physical contacts with a non-home-base, non-domiciliary state, the home base then loses all taxing power which is based upon the fact of home base or domicile. This rule or principle, the majority of the California Supreme Court state, is to be inferred from this Court's decisions in *Northwest Airlines*, *Ott*, *Peck* and *Braniff*. The majority of the California Supreme Court stated in its opinion:

"A proper decision of this case rests upon the application of four United States Supreme Court de-

cisions . . . [*Northwest Airlines v. Minnesota*, 322 US 292, *Ott v. Mississippi Valley Barge Line*, 336 US 169, *Standard Oil Co. v. Peck*, 342 US 382, and *Braniff Airways v. Nebraska State Board*, 347 US 590]" (333 P. 2d at p. 325, App. A, p. 3).

A minority of the California Supreme Court (minority opinion by Justice Traynor, 333 P. 2d 331-333, App. A, pp. 17-23, concurred in by Chief Justice Gibson and Justice Spence) were of the opinion that the power of the home base or commercial domicile to tax which is grounded upon the facts of home base and domicile is diminished when migrating aircraft acquire a situs for apportioned taxation elsewhere but that the domiciliary taxing power is diminished only to the extent that such property acquires a tax situs elsewhere.

This combination of facts has not before been squarely presented to this Court, and this case offers the opportunity for this Court to complement the principles propounded in the *Northwest*, *Ott*, *Peck* and *Braniff* cases. This case is of financial importance to every state which is the home port or home base of aircraft flying in interstate and foreign commerce. Also, solution of the problem presented herein can be of importance to states which tax ocean-going vessels. Normally, ocean-going vessels are taxable on a non-apportionment basis by the home port or domicile. Suppose ocean-going vessels make regular, recurring contacts with a non-home-port, non-domiciliary state so as to become there subject to an apportioned tax (*Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169). To what extent is the taxing power of the domicile and home port thereby reduced?

ARGUMENT.

The Principle That the Domicile of the Owner of Migrating Property Which Has Made Taxable Physical Contacts Elsewhere May Only Levy an Apportioned Tax Thereon Does Not Cause the Domicile to Be Divested of Its Power to Tax Those Portions of the Value of Property Not Taxable at All Elsewhere.

California's ad valorem taxing power with respect to aircraft is exercised through its local governments—its counties, cities, districts, etc. This is not a case presenting solely a question of state law. The California Supreme Court held that petitioners' taxing power is circumscribed in a certain manner *because* the taxing power of the State of California is so limited by the Commerce and Due Process Clauses, United States Constitution, as construed and applied by the United States Supreme Court. The distribution of a state's taxing power among its agencies and instrumentalities is, of course, a matter exclusively of State concern. But where, as here, it is held that a local government does not possess a particular power of taxation because the State itself does not have such power as a matter of Federal Constitutional Law, then there is presented a case within this Court's jurisdiction. Henceforth we shall discuss the problem presented herein solely in terms of the taxing power of the State of California.

Another point should be noted preliminarily. The legal domicile of Flying Tiger Line is Delaware, rather than California, the former being the state of incorporation. For tax purposes a corporation's domicile is often regarded as the state of its principal place of business or headquarters. See concurring opinion of Justice Jack-

in *Northwest Airlines v. Minnesota*, 322 U. S. 292 at 305. And, Justice Traynor of the California Supreme Court, speaking for three of the seven Justices thereof, stated in the minority opinion:

> "Although the state of incorporation is regarded as the legal domicile of a corporation, its domicile for tax purposes is its principal place of business or headquarters. Thus, the 'commercial domicile' rather than the state of incorporation is given the power to tax intangible property of the corporation on the ground that 'it is there that the owner in every practical sense realizes the economic advantages of his ownership.' (*First Bank Stock Corp. v. Minnesota*, 301 U. S. 234, 241 [57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228]; see *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 [56 S. Ct. 773, 80 L. Ed. 1143]; *Southern Pac. Co. v. McColgan*, 68 Cal. App. 2d 48 [156 P. 2d 81]; *Pacific Western Oil Corp. v. Franchise Tax Board*, 136 Cal. App. 2d 794 [289 P. 2d 287].) Although plaintiff is incorporated in the state of Delaware, its principal place of business, the home port of its planes, and its repair terminal are all located in the County of Los Angeles. Its aircraft habitually return to their California headquarters" (Footnote 1, 333 P. 2d 331, App. A. p. 18).

Henceforth herein we treat and refer to California as the "domicile" of the Flying Tiger Line.

The proper solution of the issue presented to the Court by this case—the method of apportionment for tax purposes which may be used by the domicile and home port when migrating aircraft acquire situs for apportioned taxation in some other state—depends upon

a rationalization and extension of three well-established principles of constitutional law:

1. The domicile and home port of migrating property may levy an unapportioned tax thereon when no "defined part of the domiciliary corpus has acquired a permanent location, i.e., a taxing situs, elsewhere." (*Northwest Airlines v. Minnesota*, 322 U. S. 292, at 295; *New York v. Miller*, 202 U. S. 584, at 597; *Standard Oil Co. v. Peck*, 342 U. S. 382, at 384-5; *Braniff Airways v. Nebraska State Board*, 347 U. S. 590, at 601-2.)

2. Migrating property which makes regular, recurring, physical contacts with a non-domiciliary state is taxable by the latter on an apportioned basis—on the basis of benefits and protections afforded such property by such non-domiciliary state (*American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *Johnson Oil Ref. Co. v. Oklahoma*, 290 U. S. 158; *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169; *Braniff Airways v. Nebraska State Board*, 347 U. S. 590).

3. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile" (*Standard Oil Co. v. Peck*, 342 U. S. 382, at 384).

The question herein presented pertains to principle "3" above: To what extent can the domicile tax migrating aircraft when a non-domiciliary state can tax on the basis of rule "2"? No opinion by this Court, or by any other state court, has, to our knowledge, considered this question.

The solution to the question presented hereby would seem to depend upon the nature of the reasons underlying

the rule of the *Peck* case that the domicile may not levy an unapportioned tax upon migrating property subject to an apportioned tax by some other state. Two reasons have been suggested by this Court: Due Process and Commerce Clause restrictions. Due Process requires that "the tax in practical operation has relation to opportunities, benefits, or protections conferred or afforded by the taxing State" (*Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, at 174). The Commerce Clause forbids multiple State taxation of instrumentalities of interstate commerce (*Standard Oil Co. v. Peck*, 342 U. S. 382 at 384). Petitioners submit that the real Federal Constitutional prohibition limiting the taxing power of the domicile in such case as this is the Commerce Clause—the prescription against imposition of multiple state tax burdens upon instrumentalities of interstate commerce. Due Process does not limit the domiciliary taxing power to benefits, protections and opportunities thereby afforded property. If Due Process did so limit the domiciliary taxing power, then the domicile would lack the power to levy an unapportioned tax upon migrating property which makes no taxable physical contacts elsewhere. Only in such case where migrating property is otherwise subject to multiple state tax burdens is the taxing power of the domicile proscribed. The domicile is not forbidden by Due Process to levy an unapportioned tax upon migrating property not taxable elsewhere even though the domicile has never rendered any benefits and protections whatever to the property taxed. (*Southern Pacific Co. v. Kentucky*, 222 U. S. 63; *Standard Oil Co. v. Peck*, 342 U. S. 382 at 384.) Therefore, the real restriction upon the domiciliary taxing power would seem to stem from the Commerce Clause. This same conclusion has been inferred from the decisions by this Court with respect to goods in transit by at least

two learned commentators. Thomas Reed Powell, *Taxation of Things in Transit*, 7 Virginia Law Review 167; Goodrich, *Conflict of Laws*, Third Edition, pp. 121-122.

If Due Process permits the domicile to subject migrating property not taxable elsewhere on an apportionment basis to a full, unapportioned tax, there seems to be no reason whatsoever why the domicile may not, in those cases where migrating property is subject to apportioned taxation by a non-domiciliary state, tax that portion of the value of such property not taxable elsewhere.

An apportioned tax by the domicile based upon that portion of the value of migrating property not taxable elsewhere would not offend the Commerce Clause. By such method of apportionment migrating property would at all times be subjected to taxation upon the basis of 100% of its value but on the other hand would not be subjected to multiple tax burdens.

The decision of this Court in *Standard Oil Co. v. Peck*, 342 U. S. 382, is not contrary to the method of apportionment contended for by petitioners herein. That case involved the domiciliary taxing power of the State of Ohio over oil barges that traveled the inland waters of the Mississippi and Ohio Rivers. Where, as in the *Peck* case, migrating property while outside the domicile is always subject to taxation elsewhere because of the nature of the property and its movement and its necessary contacts with other states, the domicile can only tax such property on the basis of its physical contacts therewith. But aircraft are a species of property different from river craft and travel and move in a different manner. In contrast to river boats, aircraft while navigating the skies do not make any taxable physical contacts whatso-

ever. (See concurring opinion of Justice Jackson in *Northwest Airlines v. Minnesota*, 322 U. S. 292 at 304, and the concurring opinion of Justice Douglas in *Braniff Airways v. Nebraska State Board*, 347 U. S. 590 at 603.) It would seem to offend neither the Commerce nor Due Process Clauses to allow the domicile in such case to include in the base for its apportioned tax the value of property not taxable elsewhere.

Anomalous tax consequences result from application of the method of apportionment prescribed by four of the seven California Supreme Court Justices (opinions of Justice McComb, 333 P. 2d 324 at 328, App. A. pp. 1-11, and Justice Carter, 333 P. 2d 328 at 331, App. A, pp. 11-17). Suppose that a migrating airplane, having its home port and the domicile of its owner in California, spends 50% of the year in California on the ground and the other 50% of the year flying about the world making no taxable contacts elsewhere. Such plane would be fully taxable by California. Now suppose the plane divides its ground time between California and New York, spending 25% of the year in each state on the ground, and spends the remaining 50% of the year flying about the world making taxable physical contacts nowhere else. In the second instance petitioners contend such plane should be taxable 75% by California, the domiciliary, home-port State, and 25% by New York. Four of the seven California Supreme Court Justices would hold such plane taxable 25% by California and 25% by New York, and the remaining portion of the value thereof, 50%, non-taxable anywhere. For no apparent reason, according to the majority of the California Supreme Court, radical tax consequences obtain when migrating aircraft make taxable contacts, however slight, with a non-domiciliary state.

We submit that such result is not to be inferred from the four decisions of this Court relied upon by the California Supreme Court.

To allow the domicile to tax that portion of the value of migrating property not taxable elsewhere at all permits at all times full taxation of such property, precludes multiple state tax burdens, and offends neither the Due Process nor the Commerce Clauses.

Conclusion.

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel,
Los Angeles County,
ALFRED CHARLES DEFLON,
Deputy County Counsel,
Attorneys for Petitioners.

APPENDIX A.

Opinions of the California Supreme Court as Printed at 333 P. 2d 323-333.

[L. A. No. 24532. In Bank. Dec. 16, 1958.]

The Flying Tiger Line, Inc. (a Corporation), Respondent, v. The County of Los Angeles *et al.*, Appellants.

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division Three, Civ. No. 22415 (159 A. C. A. 340, 323 P. 2d 1065) reversing with directions judgment of the superior court. Judgment affirmed.]

Appeal from a judgment of the Superior Court of Los Angeles County. Arnold Praeger, Judge. Affirmed.

Action to recover taxes paid under protest. Judgment for plaintiff affirmed.

Harold W. Kennedy, County Counsel, Gordon Boller, Assistant County Counsel, and Alfred Charles DeFlon, Deputy County Counsel, for Appellants.

Hill, Farrer & Burrill, Carl A. Stutsman, Jr., and Leon S. Angvire for Respondent.

McCOMB, *J.*—Defendants appeal from a judgment in favor of plaintiff in an action to recover 1953 taxes paid under protest to the Tax Collector of Los Angeles County upon the assessment of five aircraft.

Facts: Plaintiff is a Delaware corporation with its principal place of business in the county of Los Angeles. It is engaged in business as a common carrier of freight by air, operating in interstate and foreign commerce under a certificate issued by the Civil Aeronautics Board.

On the assessment date in 1953, the first Monday in March, plaintiff owned and operated 37 aircraft of two

different types. It had 27 C-46 planes, which were used only in its domestic commercial service. These planes did not have a sufficient range for overseas flying. They were assessed at a portion of their book value determined by computing the percentage of the total time, during a test period selected by the county assessor, that the planes were physically present in the county of Los Angeles. The tax on these planes is not disputed.

Plaintiff also operated 10 DC-4 planes in flying the Pacific airlift under control of the military authorities and in support of the war in Korea. The route of this lift was from the United States to Tokyo, Japan. Five of these planes were leased by plaintiff and five were owned by it. Plaintiff's interest in the leased planes was assessed on the same formula applied to the C-46 planes. This tax is undisputed.

The other five DC-4 planes that were operated on the Pacific airlift were removed from the remainder of plaintiff's fleet of 37 planes by the county assessor and were assessed at 100 per cent of their value without regard to the time they were physically present in the county. The difference between the amount of the tax paid on the full assessment of these five planes and the amount which would have been taxed if the assessor had assessed them on the same basis as all the other planes is the amount sought to be recovered.

Plaintiff filed a petition for redetermination of the assessment before the Los Angeles County Board of Supervisors, sitting as a board of equalization, for the year 1953-1954. After two hearings before the board, the application for relief was denied. The tax was subsequently paid under protest. Thereafter plaintiff filed this suit for recovery against the county of Los Angeles

and the city of Burbank. The city was made a defendant as required by section 5138 of the Revenue and Taxation Code.*

Questions: First. *Does defendant county have the power to assess an ad valorem property tax upon the full value of aircraft which are regularly flown in interstate and foreign commerce and physically present in the county only a part of the time during the period for which the tax is collected?*

No. The five planes involved were used chiefly in the performance of the Pacific airlift instituted in 1950 as a result of the Korean war, and operations during the period in question were scheduled by the military authorities and not by the Civil Aeronautics Board.

A proper decision of this case rests upon the application of four United States Supreme Court decisions. In 1944 the Supreme Court of the United States decided in Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292 [64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245], that Minnesota, the home port state of the airline, could levy a property tax on the entire value of a fleet of

*Section 5138 of the Revenue and Taxation Code reads: "Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

"If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county or city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and city such actions may be joined in one complaint.

"Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions. Or the city may provide that such actions shall be defended by its own counsel."

planes in spite of the fact that the same planes were admittedly taxed on a portion of their value by six of the seven other states through which they operated.

In 1949 the Supreme Court, in Ott v. Mississippi Valley Barge Line, 336 U. S. 169 [69 S. Ct. 432, 93 L. Ed 585], modified the rule previously laid down in Northwest Airlines, Inc. v. Minnesota, *supra*. The Ott case involved barges and tugs operated up and down the Mississippi River and owned by a corporation domiciled in Ohio. These tugs and barges were taxed on an apportioned basis by the State of Louisiana, where they made certain irregular stops. The court held that Louisiana could tax the vessels on a *portion* of their value. With reference to the question of the due process aspect of a tax of this type, the court stated at 174: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. (Citation.) Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State."

In 1952 the Supreme Court, in Standard Oil Co. v. Peck, 342 U. S. 382 [72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. R. 2d 1371], involving vessels travelling on the Mississippi River, adopted the rule that a domiciliary state could not tax the full value of property located only part of the time within a state without constituting an unreasonable burden upon interstate commerce and thus violating the due process clause of the United States Constitution. The court said at 384: "No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore

under Ott v. Mississippi Valley Barge Line Co., *supra*, could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. (Citation.) Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations."

In 1954 the Supreme Court, in Braniff Airways, Inc. v. Nebraska State Board of Eq. & A., 347 U. S. 590 [74 S. Ct. 757, 98 L. Ed. 967], applied the rule previously laid down in Standard Oil Co. v. Peck, *supra*, to aircraft flying in interstate commerce. This case involved a fleet of planes which had its home port in the State of Minnesota but which was used in and out of the taxing state, Nebraska. Nebraska imposed an apportioned ad valorem tax on the equipment, based upon the percentage of time in and out of the state. The court said at 600: "We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats."

It thus appears that the United States Supreme Court has now held that the rule which permits taxation by two or more states on an apportioned basis precludes taxation on all the property by the state of domicile.

In Standard Oil Co. v. Peck, *supra*, at 384, the court said: "Those cases, though exceptional on their facts, illustrate the reach of the taxing power of the state of the domicile as contrasted to that of the other states. But they have no application here since most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year.

. . . The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. (Citation.) Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

A taxpayer resisting an ad valorem tax on personal property based on an unapportioned assessment does not have the burden of showing that other states have actually imposed a tax on such property. He is entitled to an assessment on an apportionment basis if the record shows that he was, during a tax year, receiving substantial benefits and protection in more than one state.

In the present case, there was no apportionment with respect to the assessment of the five planes. Therefore, as a matter of law, the tax was not levied upon a proper basis.

The holding in Slick Airways, Inc. v. County of Los Angeles, 140 Cal. App. 2d 311 [295 P. 2d 40], is in accord with the foregoing views. In that case, a fairly apportioned assessment on planes of this type was determined by the Los Angeles County Assessor. The company had its principal place of business in California in 1952 and 1953. The court, at 312, had this to say with reference to the normal assessment procedure in Los Angeles County: "Plaintiff is engaged in flying a fleet of airplanes in interstate and foreign commerce. Such airplanes, under the practice of the county assessor of Los Angeles County, are assessed on the basis of a fair allocation of time, to wit, the ratio of the time spent in Los Angeles County as compared to total time."

Thereafter, the court properly recognized that under the circumstances present, which were similar to those in the instant case, the county of Los Angeles had authority to tax only a portion of the value of the planes. In referring to the decision of the United States Supreme Court in Braniff Airways, Inc. v. Nebraska State Board of Eq. & A., *supra*, the court, at 314, said: "The Supreme Court, in upholding the validity of the tax, said, at page 600: 'The limitation imposed by the Due Process Clause upon state power to impose taxes upon such instrumentalities was succinctly stated in the Ott Case: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State."'"

Second. *When relief from an improper assessment is sought from the board of supervisors sitting as a board of equalization, and denied in the belief that the only issue is one of law for the courts, is the applicant bound by this decision on an appeal to the superior court?*

No. Defendants argue that plaintiff is entitled to a trial "of factual matter which should have been but was not presented to said Board for determination." This question is not presented to this court, because the trial court rendered its decision without consideration of any evidence offered before the trial court, basing it upon a question of law.

Security-First National Bank v. County of Los Angeles, 35 Cal. 2d 319 [217 P. 2d 946], relied on by defendants, is not applicable to the facts of the present case, for in that case no application for relief was filed with the board of supervisors.

The duties of a board of supervisors sitting as a board of tax equalization are prescribed in article XIII, section 9, of the California Constitution, which reads in part: "The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation. . . ."

The duties of the board are fully set forth by this court in Universal Consolidated Oil Co. v. Byram, 25 Cal. 2d 353, 356-357 [153 P. 2d 746]: "'It must be conceded, of course, that it is well settled in this state that to the authorized county board of equalization has been confided the duty of determining 'the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable'; that in discharging this duty, the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment so far as amount is concerned constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question,' adjudicating necessarily that 'the property is assessed at the same value proportionately as all the other property in the county'; *that such adjudication 'cannot be avoided unless the board has proceeded arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers . . . or* unless there be something equivalent to fraud in the action of the board'; and that 'Mere errors in honest judgment as to the value of the property will not obviate the binding

effect of the conclusion of the board.' (Citations.) *While not classifiable with any aspect of fraud or bad faith, the lack of due process distinguishing the procedural phase of these equalization matters as submitted to the board furnishes an equally appropriate basis for the court's intervention in protection of the plaintiff's constitutional rights.*" (Emphasis added.)

The court said, at 360 [3] et seq.: "The fundamental premise of the plaintiffs' recourse to the court for relief rests upon the proposition that, as with any ad valorem tax, their constitutional right to an equalization hearing comprehends a decision *in the light of the evidence there introduced* before any determination becomes final as to them. (Citations.) As any tax proceeding is *in invitum* in nature, each step must be taken in compliance with law or the proceeding is void. The equalization stage is no exception to this rule. Compliance with the constitutional requirement for an equalization hearing is not met unless the substance as well as the form of the hearing is granted to the complaining taxpayer. (Citation.) Typical illustrations of the denial of procedural due process which have been held to invalidate purported equalization determinations are: One man hearings (citation); the taking of evidence without the presence of the taxpayer or his representative (citations); the refusal to allow reasonable opportunity for cross-examination (citation); refusal to permit reasonable argument (citation); reliance in the concluding steps upon the advice of the assessor or the assessor's attorney, particularly if done secretly (citation); and the attempted determination of a case by members of the board who did not hear the evidence, if their vote be necessary to the determination (citation).

"In line with these instances of the denial of procedural due process are the present cases. The *concluding steps* of the equalization proceeding are many times the most essential to the preservation of the taxpayer's rights."

Again the court said, at 362 [6]: "As appears from the numerous authorities cited in the forepart of this opinion, the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal. Const., art. XIII, § 9), and when that tribunal, after due hearing and within the limits of reasonable discretion, makes its *findings on the facts*, such decision is final and conclusive."

It is evident from the foregoing authority that when a board of equalization purports to decide a question of law, or refuses to hear a case on the ground that it involves only a question of law to be decided by the courts, a taxpayer has the right of resort to the courts for determination of such question.

In the present case, there was no dispute as to the facts, a question of law alone being presented to the board of equalization, as appears from the following excerpt from the transcript:

"Mr. Jessup [Member of the Board]: Mr. West, there is no chance of you and this gentleman sitting down and working this thing out?

"Mr. Anson [Deputy County Counsel]: There is a very definite legal issue other than the facts; I don't think there is too much of a quarrel as regards the facts.

"Mr. Hahn [Member of the Board]: There's no quarrel with the facts, but a legal question?

"Mr. Anson: Primarily a legal question; that is, as far as the five aircraft covered under this second item are concerned."

(See also Mahoney v. City of San Diego, 198 Cal. 388, 403 [9] [245 P. 189], where an arbitrary method of property valuation adopted by the assessor and approved by the board of supervisors was held a proper subject for court review.)

Applying the foregoing rule to the present case, it appears that plaintiff sought relief before the board of equalization. This relief was denied solely because the board, on the advice of its counsel, applied an improper principle of constitutional law. Therefore, plaintiff properly applied to the superior court for relief.

In light of the foregoing, the trial court was correct in holding that defendant county had exceeded its power to tax the airplanes here involved and in entering judgment in favor of plaintiff.

The judgment is affirmed.

SHENK, *J.*, and SCHAUER, *J.*, concurred.

CARTER, *J.*—I concur in the judgment of affirmance.

The issue presented by this case is: To what extent can the domicile state of an interstate and foreign air carrier impose an ad valorem tax on its property when one or more non-domiciliary states have acquired the power to impose an ad valorem tax on an apportioned basis. While the decided cases seem to hold that under the circumstances the domicile state cannot tax on the basis of the full assessed valuation of *all* the property, the precise extent of its power to tax has not yet been decided by the Supreme Court of the United States.

The principles bearing on this issue are contained in several recent cases. In Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292 [64 S. Ct. 950, 88 L. Ed. 1283, 153

A. L. R. 245], the court held that Minnesota, the domicile of the airline, had constitutional power to tax the airline's entire fleet of aircraft at its full value even though all the planes were continuously engaged in interstate flights. In this case Chief Justice Stone wrote a vigorous dissent in which he held that Minnesota could only impose an apportioned tax. In 1949 the Supreme Court held in Ott v. Mississippi Valley Barge Line, 336 U. S. 169 [69 S. Ct. 432, 93 L. Ed. 585], that Louisiana, a nondomiciliary state, could tax barges and tugs, moving in and out of the state, on an apportioned basis according to the commerce carried on within the state. In Standard Oil Co. v. Peck (1952), 342 U. S. 382 [72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. A. 2d 1371], involving vessels traveling on the Mississippi River, the Supreme Court adopted the rule that a domiciliary state could not tax the full value of property located only part of the time within its borders, and which must have acquired a tax situs elsewhere, without constituting an unreasonable burden on interstate commerce. The court said, at page 384: "The rule which permits taxation by two or more states on an apportioned basis precludes taxation of all of the property by the state of the domicile." Northwest Airlines was distinguished on the ground that in that case it had not been shown that "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere. The court did not spell out, however, the extent of the domicile's taxing power under the circumstances. Finally, in 1954, in Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U. S. 590 [74 S. Ct. 757, 98 L. Ed. 967], the court, applying the reasoning of the Ott case, upheld the power of a nondomiciliary state to impose an apportioned tax on

planes and flight equipment used by the taxpayer in operating a purely interstate line.

In the present case Los Angeles County, the domicile for tax purposes, seeks to impose an ad valorem property tax on the full value of five aircraft belonging to Flying Tiger Line, used chiefly in the Korean Airlift, but also used in other foreign and interstate commerce. The tax was paid under protest, and in the suit for refund the trial court gave judgment for plaintiff in an amount equal to the difference between the tax paid on the full value and the tax that should have been paid on a value apportioned according to the time the planes were physically present in the county during a certain test period.

I agree with the views expressed in the opinion prepared by Mr. Justice McComb which holds, in effect, that where a nondomiciliary state has acquired the power to impose an apportioned tax, the domicile must also impose an apportioned tax. There is no express authority to support this proposition, but it appears to be in harmony with sound principles of constitutional law.

The commerce clause is violated when a tax subjects interstate commerce to an undue burden or creates a risk of such a burden. However, it has been recognized that interstate commerce should "pay its way" in the states where it receives substantial benefits and protection, with the result that reasonable state taxation is permitted. To avoid a violation of the due process clause, the tax must bear a reasonable relation to the benefits and protection conferred by the taxing state. These rules were recognized in the Standard Oil case where the court said: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. Other-

wise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

The rule stated in the opinion prepared by Mr. Justice McComb presents no real risk of multiple taxation. A cumulative burden could result from the use in different states of different apportionment formulae, but this is not very likely. Apart from this slight possibility, apportionment of the tax base generally acknowledged to be the best way to avoid multiple taxation. It was stipulated at the trial that the aircraft in question were physically present in Los Angeles County only 36.37 per cent of the time during a test period. This percentage was used to apportion the value of the planes by the trial court and is reasonably related to the benefits and protection conferred by the county. Therefore, there does not appear to be a violation of due process.

I can see no basis for holding that the case be remanded to the board of equalization for a hearing to determine whether any other state has acquired the power to impose an apportioned tax under the rule of the Braniff case. The trial court was apparently satisfied that such a showing had been made. If no state has such power, then Los Angeles County may tax on the full value of the aircraft under the holding of the Northwest Airlines case. On the other hand, if one or more states have such power, then the Standard Oil case applies, and the full value cannot be taxed.

I have found no authority holding that the board of equalization should determine to what extent the property has acquired a taxable situs elsewhere, and then should order a reassessment of the tax accordingly. Under

this basis of taxation an undue burden on interstate commerce is likely to result in two different ways. The board of equalization is required to determine whether any portion of the Flying Tiger Line's property has acquired a taxable situs elsewhere and what that portion is. Although tests framed by the Supreme Court are available to aid the board in this determination, there are no iron-clad rules describing what contacts are sufficient to give a state jurisdiction to tax. Thus it may be that while the board will find that certain property has not acquired a taxable situs in another state and so is taxable in full by Los Angeles County, the taxing authorities in that state may reach a contrary determination and impose a tax under that state's apportionment formula. The cumulative burden that would result is apparent.

An undue burden may also arise because of the various formulae for apportionment used among the states. These formulae are computed on the basis of the presence of the aircraft in and out of the state, mileage in and out of the state, arrivals and departures in and out of the state, revenue earned in and out of the state, as well as many combinations of these factors. With a 100 per cent tax base being applied in the domicile state, different formulae applied by other states are very apt to lead to excessive taxation.

That personal property has its situs at the owner's domicile, has long been recognized as a fiction employed to prevent migratory property from avoiding taxation completely. (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 29 [11 S. Ct. 876, 35 L. Ed. 613].) This fiction was primarily used in cases involving ocean-going vessels which acquired no actual situs elsewhere. It was thought that if they were not taxable at the domicile

they might not be taxable at all. (Ott v. Mississippi Valley Barge Line, *supra*, p. 173.) As Chief Justice Stone said in his dissenting opinion in the Northwest Airlines case: "And our decisions establish that, except in the case of tangibles which have nowhere acquired a tax situs based on physical presence, and for that reason remain taxable at the domicile even if never present there, the state's power to tax chattels depends on their physical presence and is neither added to nor substracted from because the taxing state may or may not happen to be the state of the owner's domicile.' But where it appears that the carrier will not avoid taxation on a considerable portion of its property, there should be no reason to employ the fiction in whole or in part. It is obvious that to permit Los Angeles County to tax the full value of the property here involved, would impose a tax beyond that justified by its physical contacts with the county, a tax that the county has no power to impose, and thus violate due process. Moreover the tax is not reasonably related to the benefits and protection conferred by the county. "So far as due process is concerned the only question is whether the tax in practical application has relation to opportunities, benefits, or protection conferred or afforded by the taxing state." (Ott v. Mississippi Valley Barge Line, *supra*, p. 174.)

It is of some significance to note that recommendations made by the Civil Aeronautics Board in 1945, as a result of the confusion engendered by the Northwest Airlines case indicate disapproval of the domicile basis for taxation and support for some system of apportionment of the tax base. (See Multiple Taxation of Air Commerce, H. R. Doc. No. 141, 79th Cong., 1st Sess.)

It has been suggested that Flying Tiger Line will probably avoid taxation of a large portion of its property

because the greater part of Flying Tiger's Flights are overseas. This suggestion is probably well-founded. Another quotation from the dissenting opinion of Chief Justice Stone in the Northwest Airlines case, however, adequately disposes of this point: "It is no answer to suggest that the states other than Minnesota have not asserted their constitutional power to tax or that we do not know how or to what extent they have exercised it. The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do."

The logic of the foregoing is inescapable.

TRAYNOR, *J.*—I dissent. Migratory property not subject to taxation elsewhere remains taxable at the owner's domicile, for otherwise it would escape taxation altogether. (New York Central & H. R. Co. v. Miner, 202 U. S. 584, 597 [26 S. Ct. 714, 50 L. Ed. 1155]; Southern Pac. Co. v. Kentucky, 222 U. S. 63, 69, 73 [32 S. Ct. 13, 56 L. Ed. 96]; Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292, 294 [64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245]; Braniff Airways, Inc. v. Nebraska State Board of Eq. & A., 347 U. S. 590, 602 [74 S. Ct. 757, 98 L. Ed. 967]; Olson v. City & County of San Francisco, 148 Cal. 80, 83, 84 [82 P. 850, 113 A. St. Rep. 191, 7 Ann. Cas. 443, 2 L. R. A. 197]; California Shipping Co. v. City & County of San Francisco, 150 Cal. 145, 146 [88 P. 704].) To the extent that the property is taxable elsewhere it cannot be taxed by the domiciliary state, for otherwise it would be subject to multiple burdens in violation of the commerce clause. (Standard Oil Co. v. Peck, 342

U. S. 383, 385 [72 S. Ct. 309, 96 L. Ed. 427, 2 A. L. R. 2d 1371]; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255-256 [58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944].) Random excursions of migratory property into a state do not render the property taxable there, but if there is habitual use of such property in a state, the avereage amount thus habitually used is taxable there, even though the specific items are not continuously the same. (American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 82 [19 S. Ct. 599, 43 L. Ed. 899]; Johnson Oil Ref. Co. v. Oklahoma, 290 U.S. 158, 162 [54 S. Ct. 152, 78 L. Ed. 238].)

Under the foregoing rules defendants are not precluded from taxing the aircraft in question except to the extent that they are taxable elsewhere. The majority opinion, however, is at odds with these rules in holding that the county must limit the tax on the aircraft according to the time they are physically present in the county, even if they are not taxable elsewhere.

The county board of equalization was likewise at odds with these rules in deciding that the aircraft were taxable on their full value at the commercial domicile[1] on

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[1]Although the state of incorporation is regarded as the legal domicile of a corporation, its domicile for tax purposes is its principal place of business or headquarters. Thus, the "commercial domicile" rather than the state of incorporation is given the power to tax intangible property of the corporation on the ground that "it is there that the owner in every practical sense realizes the economic advantages of his ownership." (First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 241 [57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228]; see Wheeling Steel Corp. v. Fox, 298 U. S. 193 [56 S. Ct. 773, 80 L. Ed. 1143]; Southern Pac. Co. v. McColgan, 68 Cal. App. 2d 48 [156 P. 2d 81]; Pacific Western Oil Corp. v. Franchise Tax Board, 136 Cal. App. 2d 794 [289 P. 2d 287].) Although plaintiff is incorporated in the state of Delaware, its principal place of business, the home port of its planes, and its repair terminal are all located in the County of Los Angeles. Its aircraft habitually return to their California headquarters.

the ground that apportionment of the tax was not required as a matter of law since the aircraft were not flown on a schedule. The board's failure to determine whether or not any part of the property had acquired a taxable situs elsewhere was error, for defendants' power to tax is diminished accordingly if the property has acquired a taxable situs elsewhere (Standard Oil Co. v. Peck, *supra*, 342 U. S. 382, 384), whether or not other jurisdictions elect to assert their taxing power. (Johnson Oil Ref. Co. v. Oklahoma, 290 U. S. 158, 162 [54 S. Ct. 152, 78 L. Ed. 238].) Even migratory property that does not travel on a schedule may become subject to taxation in other jurisdictions.

It cannot be assumed, however, that the aircraft had acquired a taxable situs elsewhere merely because they were absent from Los Angeles County a large part of the time. No such assumption is supported by Standard Oil Co. v. Peck, *supra*, 342 U. S. 382, invoked by the majority opinion. The court there struck down an unapportioned tax imposed by the domiciliary state on oil barges that traveled the inland waters of the Mississippi and Ohio Rivers. It reasoned that river craft almost continuously within other states were subject to the taxing jurisdiction of those states, and a tax by the domiciliary state on their full value would result in "multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations." Barges that navigate interstate waterways ordinarily acquire more than one taxable situs along their course. In contrast, aircraft navigating the sky ordinarily do not acquire any other taxable situs along their course. (See concurring opinion of Jackson, J., in Northwest Airlines, Inc. v. Minnesota, *supra*, 322 U. S. 292, 304.) The

domicile is therefore free to tax all such aircraft so long as there is no showing that they have maintained sufficiently regular, recurrent physical and business contacts with other jurisdictions that would accordingly subject them to taxation there. (Braniff Airways, Inc. v. Nebraska State Board of Eq. & A., 347 U. S. 590, 600-602 [74 S. Ct. 757, 98 L. Ed. 967]; New York Central & H. R. Co. v. Miller, *supra*, 202 U. S. 584, 597 [26 S. Ct. 714, 50 L. Ed. 1155].)

Since the board erroneously failed to determine whether any part of the property had acquired a taxable situs elsewhere, the case should be remanded to it for a redetermination of the tax on the basis of the evidence submitted at hearings before it.[2] (Universal Consolidated Oil Co. v. Byram, 25 Cal. 2d 353, 362 [153 P. 2d 746].)

If the evidence then showed that the aircraft were not subject to taxation elsewhere, the county would be free to tax them on the basis of their full value. (Southern Pac. Co. v. Kentucky, *supra*, 222 U. S. 63; New York Central & H. R. Co. v. Miller, *supra*, 202 U. S. 584; Northwest Airlines, Inc. v. Minnesota, *supra*, 322 U. S. 292, 298; Braniff Airways, Inc. v. Nebraska State Board

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[2] "[T]he proper procedure upon the failure of an administrative board to give a hearing under appropriate circumstances is to remand the case to the board for proper proceedings. (Citations.) The policy underlying such a rule is that the determination of the issues should first be made by the administrative agency. It is given jurisdiction for that purpose, and interference with that jurisdiction should not be permitted until it has been pursued to the point of exhaustion." (Steen v. City of Los Angeles, 31 Cal. 2d 542, 549 [190 P. 2d 937].) Although the term of a board of equalization is limited by statute (Rev. & Tax. Code, §1603), "that provision is directory only and does not deflect from the statutory scheme that the authorized tribunal pass upon matters properly within its jurisdiction though in the *completion* of its work it must act at a time beyond the prescribed period." (Universal Consolidated Oil Co. v. Byram, 25 Cal. 2d 353, 362-363 [153 P. 2d 746].)

of Eq. & A., *supra*, 347 U. S. at 602.) If, however, the evidence showed that the property had acquired a taxable situs elsewhere, the county would have to forego taxation to the extent that other jurisdictions had acquired the power to impose an apportioned tax. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of domicile." (Standard Oil Co. v. Peck, *supra*, 342 U. S. at 384.) The board would then be compelled to apportion the tax on a basis realistic enough to preclude due process and commerce clause objections. The formula upheld in the Braniff case, *supra*, exemplifies what can be done in this regard. It encompassed such realistic factors as arrivals and departures, revenue tons handled by the carrier, and originating revenue.[3] While not exhaustive, these solid contacts with the state reflect the "opportunities, benefits or protection conferred or afforded by the taxing state" (Ott v. Mississippi Valley Barge Line, 336 U. S. 169, 174 [69 S. Ct.

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[3] "The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures with and without this state scheduled by such carrier during the same period; Provided, that in the case of non-scheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons and handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." (Braniff Airways, Inc. v. Nebraska State Board of Eq. & A., *supra*, 347 U. S. at 593.) This is the formula of the "'proposed uniform statute to provide for an equitable method of state taxation of air carriers' adopted by The Council of State Governments upon the 'recommendation of the National Association of Tax Administrators in 1947.'" (*Ibid.*)

432, 93 L. Ed. 585]), and the factors that contribute to the value of the property. Moreover, such a combination is apt to insure a fairness to both taxpayer and taxing authority that a single factor not counterbalanced by others does not afford. Indeed a single factor formula such as that of physical presence compelled by the majority opinion, may be highly arbitrary. Suppose that Airline "A" flies nonstop between New York and Los Angeles, that the aircraft are physically present in New York 10 per cent of the time and in Los Angeles 30 per cent of the time, and in the air the rest of the time. Under the majority view, the aircraft would be subject to tax on 10 per cent of their value in New York and on 30 per cent in California; 60 per cent of their value would escape taxation altogether. Yet an Airline "B" flying exclusively between Los Angeles and San Francisco would be subject to full taxation in California. Such a single factor formula leads to still more capricious results in a case like the present one of aircraft that travel over the high seas where they have no taxable contacts with any other jurisdiction. The arbitrariness of such a formula arises from the inclusion therein of "bridge time," i. e. the time the aircraft are in the air and afford no state jurisdiction to tax, and the time they are in jurisdictions on random excursions that do not render them taxable there. If physical presence is used as the formula of apportionment or as one of the factors in the formula, certainly "bridge time" and the time spent in such random excursions should be excluded entirely from the formula, and the total time used should be only the time spent in jurisdictions where the property is taxable.

The perennial contention arises that there is always danger of multiple taxation latent in the possibility that

different states would evolve different formulas of apportionment. It bears noting therefore that no court has found such a danger serious enough to invalidate an apportionment that reasonably reflects the opportunities, benefits and protection afforded by the taxing state.

GIBSON, *C. J.* and SPENCE, *J.*, concurred.

APPENDIX B.

Opinion of the California District Court of Appeal, Second District, Division Three as printed at 323 P. 2d 1065-1071.

[Civ. No. 22415. Second Dist., Div. Three. Apr. 11, 1958.]

The Flying Tiger Line, Inc. (a Corporation), Respondent, v. The County of Los Angeles et al., Appellants.

Appeal from a judgment of the Superior Court of Los Angeles County. Arnold Praeger, Judge. Reversed with directions.

Action to recover personal property taxes paid under protest. Judgment for plaintiff reversed with directions.

Harold W. Kennedy, County Counsel, Gordon Boller, Assistant County Counsel, and Alfred Charles De Flon, Deputy County Counsel, for Appellants.

Hill, Farrer & Burrill, Carl A. Stutsman, Jr., and Leon S. Angvire for Respondent.

SHINN, *P. J.*—The present action is against the county of Los Angeles and the city of Burbank to recover 1953 personal property taxes paid under protest. The interests of Burbank are the same as those of the county, since the county assesses property in Burbank and collects taxes on behalf of the city. Trial was to the court, which made findings and awarded plaintiff a refund of $38,642.70. Defendants appeal from the judgment.

Plaintiff is a commercial airline chartered by the State of Delaware. Its principal place of business is in Los Angeles County, the home port of its planes and its repair terminal being located at the Lockheed Air Ter-

minal in Burbank. During the assessment year commencing in March 1953, plaintiff operated 27 C-46 aircraft in interstate commerce under a certificate issued by the Civil Aeronautics Board and according to a flight schedule approved by said board. Plaintiff also operated 11 DC-4 aircraft. Six of the latter planes were owned by the United States of America and the planes themselves, were not taxed; the other five were owned by the airline.

The five DC 4s were primarily engaged in the transportation of passengers and freight from Travis Air Force Base, California, to Haneda Air Force Base, Tokyo, Japan, as part of the Pacific Airlift, which was instituted after the outbreak of the Korean war in 1950. Stops were made en route at Honolulu and Wake Island, where plaintiff maintained ground facilities for servicing the planes. This operation of the Flying Tiger Line was under a contract with the United States Government and the flight schedule for the DC-4s was made up a month in advance by the Military Air Transport Service. From November 1, 1952, to May 14, 1953, the planes were present in Los Angeles County only 36.37 per cent of the time. In addition to the airlift, the DC-4s were engaged in other foreign and domestic commerce; the foreign operations, distinct from the airlift, were undertaken after permission or exemption had been obtained from the Civil Aeronautics Board.

On the first Monday in March 1953, the Los Angeles County Assessor determined the value of plaintiff's aircraft, engines and flight equipment for the purpose of an ad valorem personal property tax; the amount of the assessment was $1,291,090. Approximately one-quarter of the total figure represented the C-46s and plain-

tiff's leasehold interest in the six DC-4s which were owned by the government. These were assessed on an apportioned basis, viz., at a percentage of their value equivalent to the percentage of time the planes were present in the county during the first week in March. The validity of this part of the assessment is not in dispute. The remainder of the assessment represented the five DC-4s owned by the airline. These were assessed at $985,290, their full cash value, the assessor's reason being that their operation was not scheduled by the Civil Aeronautics Board.

Plaintiff thereupon filed a petition for redetermination of the assessment with the county board of supervisors, sitting as a board of equalization. (Rev. & Tax. Code, § 1601 et seq.) The airline sought a reduction of $816,190 in the assessment. Its petition alleged that the five DC-4s were improperly assessed at their full value and were taxable on the same apportioned basis as the other planes. The board considered the application at two equalization sessions held on July 13th and 21st, 1953. After hearing testimony and argument by representatives of the airline and several assessor's deputies, the board made certain immaterial adjustments in the assessment and denied the application for relief. A tax of $79,578.91 was imposed. Plaintiff paid the tax under protest and commenced the present action.

The matter was tried on a second amended complaint and the answer thereto. Plaintiff alleged in its complaint that the assessor erroneously and illegally attributed the full value of the five DC-4s to Los Angeles County for the reason that they were not being used in operations scheduled by the Civil Aeronautics Board, notwithstanding the fact that the planes were operating in interstate

and foreign commerce and were present in the county only 21.5 per cent of the time during the preceding tax year. It was also alleged that uncontradicted testimany before the board of supervisors showed that the planes were not permanently located in the county, that jurisdictions other than Los Angeles County had subjected them to personal property taxation, and that none of plaintiff's aircraft had previously been taxed by the county at their full value. Plaintiff alleged, further, that the assessment and the equalization of the assessment were made arbitrarily and capriciously and without regard to the constitutional principle of apportionment; that the order denying the application for relief "was not an order made by the Board in pursuance of its fact finding duty to equalize said assessment but was made pursuant to representations of the County Counsel and County Assessor that the principle of apportionment applied only to aircraft operation in interstate commerce within the United States and scheduled by C. A. B. and did not apply where the aircraft were engaged in foreign commerce under contract with and scheduled by the Air Force and in which the Civil Aeronautics Board did not have jurisdiction." There followed an allegation that "said proceeding of the Board was a pretended and not an actual equalization and the Plaintiff's assessment has never been equalized in the manner provided by law . . . , and Plaintiff has been denied its right to such equalization and has no remedy or recourse except that which may be afforded by the Courts." The answer denied the invalidity of the assessment and denied any irregularity in the equalization proceedings.

The evidence at the trial consisted of a transcript of the proceedings before the board, a stipulation of the

facts heretofore stated and the further fact that between November 1, 1952, and May 14, 1953, the planes were present in Los Angeles County only 36.37 per cent of the time. The following facts were presented to the board by representatives of the airline. In previous years, all the planes owned and operated by the airline had been assessed on an apportioned basis in Los Angeles County. The airline maintained repair facilities in various airports "from Newark to Tokyo," but major overhauls on the DC-4s were performed at the Lockheed Air Terminal in Burbank. The planes were being taxed on an apportioned basis in the States of Nebraska and Wisconsin, as well as in San Mateo County, California. According to a statistical summary prepared by the airline the planes flew, in July 1952, 39.7 per cent of their total mileage in the Pacific Airlift, 55.5 per cent in other foreign commerce, and 4.8 per cent in interstate commerce. During March 1953, the mileage percentages were as follows: 94.4 per cent in the Pacific Airlift; 2.4 per cent in other foreign commerce, and 3.2 per cent in interstate commerce.

The court found that the five planes were present in Los Angeles County only 36.37 per cent of the time between November 1, 1952, and May 14, 1953; the board declined and refused to consider that fact; they were being taxed at a proportion of their value by other states; they could lawfully be assessed by Los Angeles County at only 36.37 per cent of their value; it was beyond the county's jurisdiction to assess them at their full value; the facts justifying relief from the invalid portion of the assessment were presented to the board of supervisors; the board denied relief in reliance upon the assessor's representations that the principle of tax

apportionment did not apply to aircraft engaged in interstate and foreign commerce whose flights were not scheduled by the Civil Aeronautics Board; plaintiff was entitled to a refund representing the amount of the tax in excess of a tax on 36.37 per cent of the value of its planes.

The first question to be considered is whether plaintiff obtained a fair hearing before the board of supervisors. This is the crucial question in the case, for the county board of equalization is the fact-finding body designated by law to remedy an excessive assessment and, as a general rule, its findings are final and conclusive upon the facts involved in a disputed assessment, and are not subject to review by the courts. (Cal. Const. art. XIII, § 9; Los Angeles etc. Co. v. County of Los Angeles, 162 Cal. 164, 169-170 [121 P. 384, 9 A. L. R. 1277].) However, the taxpayer must be accorded the substance as well as the form of a hearing. Where the procedure adopted by the board constitutes a denial of due process of law, the taxpayer is not limited to his administrative remedy; he may seek judicial relief. (Universal Consol. Oil Co. v. Byram, 25 Cal. 2d 353, 360-362 [153 P. 2d 740], and cases cited.)

As we have said, the court found that the supervisors did not make a determination as to the facts in issue, but decided the matter upon the assessor's representations that the doctrine of tax apportionment is inapplicable to aircraft engaging in unscheduled flights in interstate and foreign commerce.

It appears from the transcript of the equalization proceedings that none of the facts adduced on behalf of the airline was controverted by the deputies of the county counsel and those of the county assessor who

were present at the hearings. Deputy Assessor Watson stated the position of the taxing authorities as follows: "We have assessed this company for five airplanes which they own because there is no consistency to the pattern: they are not on a scheduled basis." Deputy Assessor West said: "We believe that our assessment, made in the manner in which we have made it, is legal, and that the valuation is equalized with the assessments that we have made to other owners and operators of planes being used on a contract for non-scheduled flight basis." Supervisor Jessup then asked: "I'd like to ask the County Counsel here, now, is this the legal point of the argument. . . ." Mr. West answered: "The issue involved, as I understand, Mr. Jessup, is whether or not these five planes have the status for taxation in Los Angeles County. . . . They are a distinct and separate operation from that scheduled airlines part of the business." Supervisor Hahn asked: "There's no quarrel with the facts, but a legal question?" Mr. Anson, the deputy county counsel, replied: "Primarily a legal question. . . ." Supervisor Ford asked: "Isn't it a matter that better go to the courts?" Anson replied: "While it may be a matter to go to the courts, unfortunately it is also a matter that this Board has to decide in the first instance. It is a very difficult question. It will be a difficult question for the courts to decide ultimately. . . ." At the close of the second hearing, Supervisor Jessup asked: "Are you going to ask that he [the representative of the airline] be heard again?" County Assessor Quinn replied: "No, he's going to court from here."

The conclusion is inescapable that the board denied plaintiff a reduction of its assessment upon the ground

that the only question involved in the proceedings was one of law, and that the law was as the taxing authorities had stated it to be. It is obvious that the supervisors disregarded the testimony of the airline's representatives and deemed it of no moment in view of the question they thought they had to decide. As we have said, a county board of equalization is a fact-finding body. Plaintiff was entitled to an adjudication of the merits of its case, which, manifestly, it did not receive. We think the court was warranted in determining that the airline was deprived of a fair hearing by the board.

However, the court erred in undertaking to equalize the disputed assessment. That, as we have stated, was the function of the board. Having found the supervisors' ruling to be a nullity, the court should have remanded the proceedings to the board for a determination upon the basis of evidence submitted to it. (Bila v. Young, 20 Cal. 2d 865, 869-870 [129 P. 2d 364]; Universal Consol. Oil Co. v. Byram, *supra*, 25 Cal. 2d 353, 362-363]; Steen v. City of Los Angeles, 31 Cal. 2d 542, 546 [190 P. 2d 937].) Accordingly, the judgment cannot be allowed to stand and the matter must be referred back to the board for further action in accordance with due process of law.

Upon the remand, the board will have to determine whether the full value of the planes is attributable to Los Angeles County or whether they may be assessed by the county at only a proportion of their value.

In this connection, the applicable principles of law are stated in four decisions of the United States Supreme Court. These are: Northwest Airlines v. Minnesota, 322 U. S. 292 [64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R.

245], decided in 1944; Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169 [69 S. Ct. 432, 93 L. Ed. 585], decided in 1949; Standard Oil Co. v. Peck, 342 U. S. 382 [72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. R. 2d 1371], a 1952 case; and Braniff Airways v. Nebraska State Board of Equalization, 347 U. S. 590 [74 S. Ct. 757, 98 L. Ed. 967], decided in 1954.

The law as applicable to our case is admirably stated in the county's brief as follows: "The state of the home port of roaming, migratory property and the state of the commercial domicile of the owner thereof has power to tax such property on the basis of its full value unless another jurisdiction or jurisdictions have acquired power to tax. When jurisdictions other than the home port and commercial domicile have acquired power to tax on an apportioned basis, the full power of the home base to tax is diminished to the extent, but only to the extent that such other jurisdictions have by regular, recurring physical contacts acquired the power to tax. For example, if a plane having its home port in Los Angeles County were continually to circle the globe and never to land anywhere but in Los Angeles County for cargo, fuel, repairs, overhauls, etc., beyond doubt such plane would be subject to *ad valorem* property tax by Los Angeles County as its full value. If the plane, instead of landing only in Los Angeles County, also made landings in New York State and in so doing spent 10 per cent of the year there, New York would have the power to tax on 10 per cent of its value, and Los Angeles County as the home port and commercial domicile, would have the power to tax on the basis of the remaining 90 per cent of the value. This method of apportionment would not offend the due process or commerce

clauses of the Constitution. Thereunder, roaming, migratory property such as these planes would never be taxed in excess of their value; nor, thereunder, on the other hand, would they escape taxation up to their full value."

The factual question to be decided by the board was whether, in their interstate and foreign operations, the planes maintained sufficiently regular business contact with other states or foreign countries to subject them to an apportioned tax therein. (See Braniff Airways v. Nebraska State Board, *supra*, 347 U. S. 590, 600-601 [74 S. Ct. 757, 98 L. Ed. 967, 977].)

If from the evidence before the board it is determined that the planes were subject to taxation in one or more other jurisdictions, the board should make its own determination with respect to the proper basis of apportionment of value as between Los Angeles County and such other jurisdiction or jurisdictions.

The judgment is reversed with directions to the trial court to remand the matter to the Los Angeles County Board of Equalization for further consideration and action in accordance with due process of law and with the views herein expressed.

WOOD, (PARKER), *J.*, and VALLÉE, *J.*, concurred.

APPENDIX "C."

Memorandum Opinion of the Trial Court.

Not Printed.

In the Superior Court of the State of California, in and for the County of Los Angeles.

The Flying Tiger Line, Inc., a Delaware corporation, Plaintiff, vs. The County of Los Angeles and The City of Burbank, Defendants. No. 629,330.

Plaintiff is a Delaware corporation but its principal place of business in Burbank, Los Angeles County, which is its "domicile."

As to the major portion of plaintiff's business, it is a regularly scheduled and certified common carrier of freight in interstate commerce. The 27 planes used in this service were taxed by the County of Los Angeles on an apportionment basis.

The leasehold interest of plaintiff in six DC-4 planes leased from the government and operated on the Pacific Airlift were assessed on an apportionment basis. (Second Amended Complaint, Par. VII—admitted by failure to deny.) This is the basis for taxation by Los Angeles County with respect to all airplanes employed in interstate and foreign commerce (see Transcript of hearing before Board of Equalization [Pl. Ex. 2] pp. 8 and 9).

(See also Slick Airways v. County of L. A., 140 A. C. A. 321.)

Plaintiff owns five DC-4 aircraft which it operated under a contract with the United States Government from Fairfield, California, to Tokyo, Japan, on the Pacific Airlift.

In paragraph IX of the stipulation of facts, it is stipulated that these planes also were operated "in European flights and domestic and interstate commerce." When not so in use or when repairing or overhauling was necessary, the planes were located in Burbank which was their "home port."

A tax was levied on these five planes based on the full appraised value, because they were not operated on a scheduled basis, and there was "no consistency to the pattern" of operation. (Pl. Ex. 2, p. 9, 1st hearing*.)

Plaintiff paid the tax under protest, and thereafter filed a petition for re-assessment with the Board of Supervisors sitting as the Board of Equalization.

The petition requests re-assessment of several items and it cannot be determined from it at what amount the five DC-4 planes were assessed nor the amount at which plaintiff claims they should be assessed.

Exhibit "C" to the petition shows aircraft assessed by the assessor at $1,079,690.00 and the assessment thereof "as computed by the taxpayer" at $263,500.00. The 27 aircraft admittedly properly assessed and the five aircraft in question are, no doubt, included in both figures. Therefore no specific figure at which plaintiff claimed the five airplanes should be assessed was submitted to the Board for its consideration. The percentage of time the five airplanes are shown, on Exhibit "A" to the petition, to have been in Los Angeles County in July, 1952 and in March 1953, is infinitesimal compared to the time the five planes were stipulated to have been present in the County for the 405 days from November 1, 1952 to May

*All references will be to transcript of first hearing until otherwise noted.

14, 1953, which was 36.37% of the time. (See Stipulation of Facts filed herein on March 22, 1956.).

The Transcript of the hearings before the Board was introduced in evidence as Plaintiff's Exhibit 2. The Court has read the transcript.

Mr. Finney on behalf of the petitioner testified: "In prior years all our aircraft have been apportioned. This year our Douglas DC-4 Aircraft were assessed 100 percent to Los Angeles County, whereas our Curtis C-46 Aircraft were apportioned as in prior years." (Tr. p. 3.) "That the aircraft have been doing identical work since July, 1950." (Tr. p. 6.) This testimony was not contradicted.

Mr. Finney testified that the five planes were "definitely scheduled" but he did not offer in evidence the schedule he said he had with him. (Tr. p. 5.) And it appears said planes were not scheduled by the C.A.B., as were the C-46s, but were under contract to the Military Air Transport Service. (Tr. pp. 6-7.)

Mr. Finney testified that the five planes had been taxed in San Mateo County and by the states of Wisconsin and Nebraska; but no further showing in this regard was made. (Tr. p. 7.)

No evidence was introduced to support the figures shown on Exhibit "A" to the petition. Mr. Finney said he had flight logs for "the week beginning noon, March 2, 1953, on the five aircraft, if you want to examine them." Apparently they were not offered in evidence, but Mr. Watson said he had examined them "to some degree. . . . It's quite a big job to try to examine all these in detail." (Tr. p. 14.)

However, the assessor was able to determine the time the C-46s were in Los Angeles County without assist-

ance from plaintiff and no doubt could have determined the same question with respect to the five DC-4s if he had wanted to do so. But as is hereafter pointed out, that was not the desire of the assessor.

The record before the Board shows that the aircraft of United Air Lines, TWA and American Air Lines are taxed on an apportionment basis. (Tr. 20.)

There is no showing anywhere in connection with this case that the planes of any other company used in interstate or foreign commerce were assessed 100% of their value because they were not operated on schedules under the jurisdiction of the C.A.B.

It appears that Slick Airways are taxed on the apportionment basis. (See Slick Airways v. County of Los Angeles, 140 A.C.A. 321.) That company "is engaged in flying a fleet of airplanes in interstate and foreign commerce" (p. 322).

The plaintiff did not make any definite showing before the Board with respect to the time the five DC-4s were in Los Angeles County.

However, it seems to me that the Board was not really interested in a showing of how much time the airplanes were in Los Angeles County but were interested in the question whether the assessor could legally assess scheduled and non-scheduled aircraft on a different basis. (See Tr. p. 15, line 22, to p. 17, line 7; Tr. p. 19, line 13, to p. 20, line 16.) And the Chairman suggested "Isn't it a matter that better go to the courts?" (Tr. p. 16, line 13.) And at the outset of the hearing before the Board it was recognized that the determination of the taxability of the five DC-4s other than on an apportionment basis was primarily a legal question. (Tr. p. 4, lines 6-13.)

At the close of the first hearing Mr Anson advised the Board that it would be advisable to have a recheck of "these figures," and Mr. Jessup said "I'd like to see if we can't do this and come back and see if you can't come up with something. I move that it be rechecked." The motion carried, and the hearing adjourned. (Tr. 20, lines 17-22.)

At the second hearing it clearly appears that the only matter in which the Board was interested was the right to assess scheduled and nonscheduled flights on a different basis, and that it would not have considered figures relating to the time the five planes were in Los Angeles County even had they been offered in evidence.

While the burden of proof is on the taxpayer to show that the assessment is improper, and if the issue before the Board really had been the time the planes were in Los Angeles County, the plaintiff would not have met its burden of proof; the Court believes that the real question is one of law as to whether scheduled and nonscheduled aircraft, such as the ones here involved, may be assessed on a different basis, and whether the County may assess airplanes operated in interstate and foreign commerce other than on an apportionment basis. (See Standard Oil Co. vs. Peck, 342 U. S. 382, 96 L. ed. 427.)

The Second Amended Complaint alleges, and the Answer of defendants admit:

That the five aircraft in question were assessed at a valuation of $985,290.00 (par. III); that plaintiff's fleet of aircraft were engaged in two principal types of operations, which were based upon the type of aircraft used, C-46s being scheduled by the Civil Aeronautics Board for operations in the United States and the DC-4s were principally used in the Pacific Airlift and scheduled by the Air Force (par. V); that the assessor assessed the C-46s

based on time within and without the Country during a one-week test period in the month of March, 1953 (par. VI) that DC-4s *leased* by plaintiff and used on the Pacific Airlift were assessed to plaintiff based on the percentage of time these aircraft were within the County of Los Angeles (par. VII), that the five DC-4s *owned* by plaintiff and engaged in the Pacific Airlift were assessed at 100% of their value and not on an apportionment of time basis. In fact the answer admits that these aircraft were only in the County 21.5% of total hours during the full year prior to the assessment date (par. VIII) that County assessor did not classify the DC-4s owned by plaintiff in the same category as the C-46s because the DC-4s were not used in an operation scheduled by the Civil Aeronautics Board (par. IX).

Defendants have denied the allegations of paragraph XII of said Complaint but the allegations of subdivisions (a), (b), (d) and (e) appear to be true from the record before the Board and the admissions of the answer.

With respect to paragraph XIV of said Complaint, the allegations of which are denied by the Answer, it would appear from the transcript of the hearings before the Board that it is true that "The order of July 21, 1953, made by the Board of Supervisors sitting as a Board of Tax Equalization was not an order made by the Board in pursuance of its fact-finding duty to equalize assessment but was made pursuant to representations of the County Counsel and County Assessor that the principle of apportionment applied only to aircraft operation in interstate commerce within the United States and scheduled by C.A.B. and did not apply where the aircraft were engaged in foreign commerce under contract with and scheduled by the Air Force and in which the Civil Aeronautics Board did not have jurisdiction."

In paragraph XV of the Second Amended Complaint it is alleged, and admitted by the answer, that $60,730.32 of the taxes paid by plaintiff was levied on the five DC-4s on the basis of 100% of their value. As previously stated plaintiff alleged and defendants admitted that these planes only were in the County of Los Angeles 21.5% of the time. (See paragraph VIII of Second Amended Complaint—admitted by failure to deny. See also stipulation of facts, par. V.)

The same allegation was made in the original complaint and denied in the answer. However, on October 26, 1955, the parties entered into a stipulation which provides that "for a representative or sample period—being the period November 1, 1952, to May 14, 1953, said aircraft were physically present in the County of Los Angeles 36.37% of the time."

The Court is of the opinion that this stipulation should govern the matter of the time said DC-4 planes were in the County for apportionment purposes.

"Actions to recover taxes paid under protest are equitable in nature." (Simms v. County of Los Angeles, 35 Cal. 2d 303; p. 316.)

"Assessments will be invalidated by the courts if the taxing authorities resort to arbitrary methods varying from that employed in assessing other property of like character and situation, and resulting in the imposition designedly of an unequal burden on the property of the complainant." (Simms v. County of Los Angeles, *supra*, at page 316.)

The record in this case seems to clearly establish that an "arbitrary method" of assessing the five DC-4s, "varying from those employed in assessing property of like character and situation" was employed, and that it re-

sulted in "the imposition *designedly* of an unequal burden on the property of the complainant." (Emphasis added.)

The Court has read and is familiar with the cases which hold that boards of equalization are judicial bodies and that their determination of questions of fact are final, in the absence of fraud or other vitiating circumstances.

But this case seems to present a different problem. The Board did not determine the valuation of plaintiff's five DC-4s as a question of *fact;* it determined that as a matter of law the County had the right to value said planes for assessment purposes on a different basis than it assessed planes "of like character and situation"—not only planes operated by other companies but planes "of like character and situation" operated by plaintiff itself.

The situation seems to be the same as if the Board determined that the County had the legal right to tax property, when in fact no such legal right existed. That would not be the determination of a question of fact binding on a court.

It further appears to the Court that relief should be granted to plaintiff under the principals announced in Mahoney v. City of San Diego, 198 Cal. 388.

In arriving at its conclusions in this case the Court has not considered any testimony introduced at any hearing before it. The conclusions have been reached on the facts admitted by the pleadings, as supplemented by the stipulation of facts, the transcript of the proceedings before the Board of Equalization, and what the Court considers to be the applicable law.

The Court will find that the allegations of paragraphs I, II, III, V, VI, VII, VIII, IX, X, XI, XV and XVI of the Second Amended Complaint are admitted by the defendants and therefore are found to be true.

With respect to the allegations of paragraph IV of said complaint the Court will find that the County Assessor declined to take into account the fact that the aircraft described in paragraph III of said Complaint were engaged in part in interstate and foreign commerce and were absent from the County of Los Angeles a substantial part of the period of one year immediately preceding the date of the assessment thereof for the fiscal year 1953-54, to wit, 63.63% of the time, and that said planes were in the County 36.37% of the time.

With respect to paragraph XII of said Complaint the Court will make findings of fact in accordance with the views hereinbefore expressed.

The Court will find the factual allegations of paragraph XIII to be true except as to the figure of $169,000.00 which, the Court will find to be untrue, and will find the figure to be $358,349.97.

The Court will find the allegations of paragraph XIV true.

With respect to paragraph XVII the Court will find the allegations thereof are untrue, and will find that on the basis of said five DC-4s being in the County of Los Angeles 36.37% of the tax year 1953-54, said planes should have been assessed at the sum of $358,349.97 and the total tax thereon to be the sum of $22,087.62.

The Court will find the first sentence of paragraph XVIII to be true, but the remainder to be untrue, but will find that plaintiff is entitled to a refund of $38,642.70.

Counsel for plaintiffs directed to prepare findings of fact and conclusions of law and judgment in accordance with the foregoing views.

October 16, 1956.

ARNOLD PRAEGER,
Arnold Praeger, *Judge*

FILE COPY

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 834

THE COUNTY OF LOS ANGELES and the CITY OF BURBANK,

Petitioners,

vs.

THE FLYING TIGER LINE, INC., a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Issue.

Respondent respectfully submits, pursuant to Rule 24 of this Court, that the Petition for Writ of Certiorari filed herein should be denied since this case does not represent an issue for decision by this Court within the scope of 28 U. S. C. A. Paragraph 1257(3), nor is it one in which the "special and important" reasons required by Rule 19 of this Court for a review by Writ of Certiorari are present.

Facts and Contentions.

During the year 1953, the taxing authorities of the County of Los Angeles, in assessing *ad valorem* property taxes on aircraft moving in interstate and foreign commerce, applied a valid and constitutional formula. This formula was to impose a tax on flight equipment measured by the portion of its value represented by the percentage of time during the year that the equipment was physically present within Los Angeles County and receiving the benefits for which the tax was assessed. Arbitrarily, and without proper cause, the taxing authorities singled out five planes from the fleet of aircraft owned and operated by Flying Tigers during that year and taxed these planes at one hundred per cent of their value. This arbitrary assessment was based upon the erroneous belief that these five planes were not being operated on "scheduled" flights. The reason for this determination was that the aircraft in question were being used in connection with the Tokyo airlift operated by the Military Air Transport Service during the Korean War rather than on operations scheduled by the United States Civil Aeronautics Board. All other flight equipment of the respondent and all flight equipment of several other certified airlines operating in and out of Los Angeles County was taxed during this year in accordance with the County's time-in to total time formula.

After administrative relief from this arbitrary assessment was denied by the Los Angeles County Board of Supervisors, sitting as a Board of Tax Equalization, an action was commenced by the company in the Superior Court of the State of California in and for the County of Los Angeles. After hearing the evidence, the Trial Court determined the amount of tax collected over and

above what would have been collected had these five planes been accorded equal treatment, and ordered a refund of the excess amount. The Trial Court's opinion (reproduced as Appendix "C" of the Petition for Certiorari) stated in part, quoting from the case of *Simms v. County of Los Angeles*, 35 Cal. 2d 303, as shown at pages 41 and 42 of the Petition:

> " 'Assessments will be invalidated by the courts if the taxing authorities resort to arbitrary methods varying from that employed in assessing other property of like character and situation, and resulting in the imposition designedly of an unequal burden on the property of the complainant.' "
>
> "The record in this case seems to clearly establish that an 'arbitrary method' of assessing the five DC-4's 'varying from those employed in assessing property of like character and situation' was employed, and that it resulted in 'the imposition *designedly* of an unequal burden on the property of the complainant.' "

The Trial Court further found (Appendix "C," p. 38):

> "The record before the Board shows that the aircraft of United Air Lines, TWA and American Air Lines are taxed on an apportionment basis. [Tr. 20.]
>
> "There is no showing anywhere in connection with this case that the planes of any other company used in interstate or foreign commerce were assessed 100% of their value because they were not operated on schedules under the jurisdiction of the C. A. B.
>
> "It appears that Slick Airways are taxed on the apportionment basis. (See Slick Airways v. County of Los Angeles, 140 A. C. A. 321.) That company 'is engaged in flying a fleet of airplanes in interstate and foreign commerce' (p. 322)."

Thus the Trial Court afforded relief to Respondent consisting of an assessment of these five planes on the same basis as was used in assessing property of like character and situation during the year in question.

The Trial Court, the District Court of Appeal, an intermediate appellate court, and the California Supreme Court, all agreed that the company was entitled to relief from the arbitrary assessment of these five planes. Indeed, Petitioner conceded as much in his appeal briefs. The only difference of opinion among the judges was as to how this relief should be determined. On the evidence, the Trial Court determined and granted the relief; the California Supreme Court affirmed this decision. The District Court of Appeal and the minority opinion of the California Supreme Court felt that the matter should have been remanded to the Board of Tax Equalization. Thus the only issue decided was one of the proper procedure under California law, and such issue does not raise a Federal question under Section 28 U. S. C. A., Paragraph 1257(3).

The Petition for Certiorari fails to disclose the ultimate relief requested of this Court and thereby attempts to circumvent the jurisdictional requirements. Any relief which this Court could grant must of necessity direct that the matter be remanded to the Board of Tax Equalization if this Honorable Court deemed it appropriate to do so.

In the process of arguing this case, the County Counsel of Los Angeles County has evolved a new formula of valuation of these planes which he believes is preferable to that used by the County in 1953. To apply a new and different formula to Flying Tigers under these circumstances would clearly constitute a denial of equal protection of the law. The new method of assessment devised

by the County in the process of this litigation was not employed during the year 1953 and has not been employed previously or subsequent to such year.

Thus the determination sought in this case does not involve a true question under the United States Constitution. The company simply sought assessment of its aircraft on the same basis as was applied to property of like character and situation. This the company received by a determination of the California Supreme Court which decided a question of California procedural law.

As was pointed out in *United States ex rel. Herge v. Commonwealth of Pennsylvania*, 89 Fed. Supp. 636, citing the case of *Williams v. Kaiser*, 322 U. S. 471:

> "It is a well-established principle that before the Supreme Court will review a decision of a state court, it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. Where the decision of the state court might have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, the Supreme Court of the United States will not undertake to review the state decision."

This Court also stated in *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70 at page 74:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (Citations omitted.)

'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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